

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

K.B. and M.B., by their mother,
Next Friend, and guardian T.B.,
P.S., by his guardian, M.S.,
G.P., by her parent and Next Friend A.P.,
D.P., by his guardian, T.P.,
G.G., by his mother and Next Friend M.G.,
J.W., by his guardian S.P.,

Case No. 1:18-cv-11795-TLL-PTM
Hon. Thomas L. Ludington
Magistrate Judge Patricia T. Morris

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF HEALTH
AND HUMAN SERVICES; NICK LYON,
Director of Michigan Department of Health
and Human Services in his official capacity;
and RICHARD SNYDER, Governor of Michigan,
in his official capacity; jointly and severally,

Defendants.

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There is no other civil action
between these parties arising out of
the same transaction or occurrence
as alleged in this complaint
pending in this court, nor has any
such action been previously filed
and dismissed after having been
assigned to a judge.

**MICHIGAN PROTECTION
AND ADVOCACY SERVICE**

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**PLAINTIFFS' MOTION TO FILE SUR-REPLY IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs K.B. and M.B., by their mother, Next Friend, and guardian, T.B, P.S., by his guardian, M.S., G.P., by her parent and Next Friend, A.P, D.P., by his guardian, T.P., G.G., by his mother and Next Friend, M.G., and J.W., by his guardian, S.P., respectfully move this Honorable Court for leave to file a short Sur-Reply brief in opposition to Defendants' Motion to Dismiss. In support, Plaintiffs state:

1. Defendants' Reply Brief includes misrepresentations and inaccuracies, and incorrect statements of law. For example, Defendants' Reply Brief states that Plaintiffs did not attack the adequacy of Notices in their Complaint. This is false.

2. Here, Defendants have raised issues for the first time in reply, and Plaintiff should be given an opportunity to address these issues to correct inaccurate statements of fact and law.

3. Courts in this circuit, and others, have repeatedly held that "a district court responding to a request for leave to file a sur-reply routinely grants such motions when a party is unable to contest matters presented to the court for the first time in the last scheduled pleading." *Laws v. Stevens Transp., Inc.*, No. 2:12-CV-544, 2013 WL 4510395, at *2 (S.D. Ohio Aug. 23, 2013) (internal quotations omitted); *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003).

4. New issues should not be raised for the first time in reply briefs. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) ("[W]e have found issues to be waived when they are raised for the first time in...replies to responses."); *U.S. v. Galaviz*, 645 F.3d 347, 362 (6th Cir. 2011) ("We do not usually entertain new arguments raised for the first time in a reply brief.").

5. Additionally, Defendants' Reply Brief incorporates arguments outside the scope of Fed. R. Civ. P. 12(b)(6) and, more emphatically than in its prior filings,

directs the Court to assess the factual basis of Plaintiffs' Complaint. *See* ECF No. 21, pp. 4-7.

6. Defendants have failed to address, in multiple briefs, the corrective action provisions within their own contracts with third parties – provisions which directly contradict arguments Defendants advance in their Reply Brief.

7. Defendants continue to miscast the relevance of 42 C.F.R. § 435.903.

8. Plaintiffs believe that this Court's consideration of the issues raised in Defendants' Reply would be materially assisted by the proposed Sur-Reply Brief and therefore respectfully requests leave to file the Sur-Reply Brief attached as **Exhibit A**.

9. Pursuant to Local Rule 7.1(d), Plaintiffs' counsel conferred with Defendants' counsel in good faith effort to obtain the relief sought, but concurrence was denied.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that this Court permit Plaintiffs to file the attached Sur-Reply Brief in Opposition to Defendants' Motion to Dismiss.

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Dated: October 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, a copy of the foregoing *Plaintiffs' Motion to File Sur-Reply in Opposition to Defendants' Motion to Dismiss, Plaintiffs' Sur-Reply in Opposition to Defendants' Motion to Dismiss* and this *Certificate of Service* was filed electronically with the Clerk of the Court which sends notice by operation of the Clerk's electronic filing service to all ECF participants registered to receive notice in this case.

Respectfully submitted,

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